

MICHELSON, KANE, ROYSTER & BARGER, P.C.

ATTORNEYS AND COUNSELORS AT LAW

HARTFORD SQUARE NORTH
TEN COLUMBUS BOULEVARD
HARTFORD, CONNECTICUT 06106

RICHARD L. BARGER
STEVEN B. KAPLAN
MARK E. BLAKEMAN†
CHRISTOPHER W. HUCK†

Telephone (860) 522-1243
Facsimile (860) 548-0194
www.mkrb.com

PAUL S. TAGATAC
PAUL R. FITZGERALD†
BETH N. MERCIER

† ALSO ADMITTED IN MASSACHUSETTS

Testimony of Attorney Steven B. Kaplan Legal Counsel to the Connecticut Subcontractors Association Re: Raised Bill 6598--

An Act Concerning Offers of Compromise in Construction Contract Arbitration Proceedings and Mediation and Arbitration of Construction Contracts April 1, 2011

My name is Steven Kaplan. I am a partner with the Hartford law firm of Michelson, Kane, Royster & Barger, P.C. in Hartford, where I have concentrated in the area of construction law for 30 years. I routinely represent contractors, subcontractors, construction managers, design professionals, and owners in all matters involving contracts for public and private construction. I am Legal Counsel to the Connecticut Subcontractors Association, as well as Chairman and a founding member of the Construction Law Section of the Connecticut Bar Association. I also have mediated and arbitrated scores of construction cases, as an advocate and also as a mediator and arbitrator.

The Connecticut Subcontractors Association (CSA) supports Raised Bill 6598, An Act Concerning Offers of Compromise in Construction Contract Arbitration Proceedings and Mediation and Arbitration of Construction Contracts. The CSA thanks the Judiciary Committee for considering this important legislation.

The CSA is a leading trade association that represents the interests of construction trade contractors in Connecticut. Virtually all of CSA's members are trade contractors who work in public and private construction in Connecticut, and oftentimes find themselves involved in mediation or arbitration proceedings.

It is a fact of life in the construction industry that disputes arise despite the good faith efforts by all parties involved, and these frequently lead to mediation (non-binding settlement conferences) and then arbitration if the case does not settle. Be reminded that for all matters subject to the scope of the bill, arbitration is a matter of contract or mutual agreement between the parties that supplants judicial proceedings as the binding dispute resolution mechanism for the parties. [There are statutory arbitration proceedings in state construction contracts that are not subject to the bill.]

House Bill 6598 addresses two important aspects of consensual arbitration and mediation:

Section 1— This section provides a practical, workable mechanism for an "offer of compromise" to be utilized in arbitration proceedings. Presently, Conn. Gen. Stat. §52-192a provides for an offer of compromise in civil litigation. The pending bill would implement a virtually identical mechanism for arbitration proceedings. That is, prior to the issuance of a final award by the arbitrator,

a party can submit a confidential offer of compromise to the other party. If that offer is accepted, the matter is resolved. If the offer is rejected, and the offering party eventually recovers an equal or greater amount than the offer of compromise, then a court that confirms the award as a judgment would add eight percent interest to the award commencing from the date of the arbitration demand. [Note that private arbitration awards are subject to confirmation as judgments in the courts through longstanding statutory procedures.]

As with the offer of compromise provision for civil litigation under §52-192a, the bill incentivizes the parties to settle arbitration cases, and properly compensates parties who submitted reasonable settlement offers that were rejected by the other party. Especially in the case of trade contractors who are seeking payment for work performed, this mechanism would help to avoid lengthy and expensive arbitration proceedings. It also would compensate those parties who attempted to settle cases on a reasonable basis, but were thwarted by an unreasonable counterpart. As such, it would help to level the playing field in construction arbitration proceedings, which oftentimes involve disputes between parties of unequal financial strength.

Section 2—This section clarifies the language of Conn. Gen. Stat. §42-158m. Consistent with the original intent of the statute (which CSA supported), it clarifies that all construction disputes pertaining to projects located in Connecticut will be arbitrated or mediated (as well as litigated) in Connecticut and pursuant to our state law.

Thanks again to the Chairmen and all members of the Judiciary Committee for considering the CSA's comments on this important legislation.